IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

SYLVESTER MCCLAIN, on his own behalf and on behalf of a class of similarly situated persons, et al.,	§	
Plaintiffs,	§	CIVIL ACTION NO. 9:97-CV-063
vs.	§	
	§	JUDGE COBB
LUFKIN INDUSTRIES,	§	
Defendant.	§	

DEFENDANT LUFKIN INDUSTRIES, INC.'S MOTION FOR PROTECTION FROM PLAINTIFFS' FIFTH REQUEST FOR PRODUCTION OF DOCUMENTS

Defendant Lufkin Industries, Inc. ("Lufkin") moves for protection from Plaintiff's Fifth Request for Production of Documents, which seeks information about Lufkin's attorneys' fees and costs. The Fifth Circuit has held that a non-prevailing party's attorneys' fees are not relevant to the prevailing party's entitlement (or lack of entitlement) to attorneys' fees. The only conceivable purpose for Plaintiffs' discovery request was to coerce Lufkin to agree to stipulate to the reasonableness of Plaintiffs' billing rates and the time spent by Plaintiffs' counsel on this case. This Motion is being filed simultaneously with Lufkin's Response to Plaintiffs' Request to Shorten Time Within Which Defendant Lufkin Industries, Inc. Must Respond to Plaintiffs' Request for Production of Documents.

A. The Fifth Circuit Has Determined that a Fee Opponents' Fee and Cost Records are Irrelevant to the Inquiry into Whether a Fee and Cost Request is Reasonable.

Plaintiffs must first satisfy the threshold requirement of relevance to its claim of attorneys' fees and costs in order to obtain discovery of Lufkin's fee and cost records. FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party"). In *Harkless v. Sweeny Indep. School Dist.*, 608

F.2d 594, 598 (5th Cir. 1979), the Fifth Circuit stated explicitly that the fact "[t]hat defense counsel spent significantly less on this case than did counsel for the Plaintiffs is irrelevant so long as all compensated work was necessary and performed in an expeditious manner." (emphasis added).[1] *Harkless* is directly on point as Defendant's attorneys' fees are significantly less than the "fair estimate" filed by Plaintiff.[2]

Subsequent Fifth Circuit district courts have followed *Harkless*. For example, the Eastern District of Louisiana in *Grantham v. Moffett*, C.A. No. 93-4007 Section "N"(3), 1996 WL 3750, at *10-11 (E.D. La. Jan. 3, 1996), held that the difference between a defendant's and plaintiff's proposed rates "have little relevance when determining an appropriate basis upon which to set Plaintiff's counsel's rates" (citing *Mirabel v. General Motors Acceptance Corp.*, 576 F.2d 729, 731 (7th Cir. 1978) and *Brooks v. Georgia State Bd. of Elections*, 997 F.2d 857, 869 (11th Cir. 1993)).[3]

Harkless has also been held controlling in Texas state courts. A Texas court of appeals cited *Harkless* in granting mandamus remedying a trial courts' abuse of discretion in ordering discovery of defendant's fee records in support of plaintiffs' fee applications. *See MCI Telecomm. Corp. v. Crowley*, 899 S.W.2d 399, 404 n.4 (Tex. App.—Forth Worth 1995, rehearing denied) ("And in any event, the Fifth Circuit, which we would look to for controlling

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[1] *Harkless* was a race discrimination case brought under 42 U.S.C. § 1988 by several black school teachers against Sweeny Independent School District alleging racial discrimination in the School District's decision not to rehire them for the 1966-67 school year, the first in which the School District desegregated its schools.

[2] Because Plaintiffs sought expedited discovery, Defendant's counsel conducted a preliminary review of fees. Defendant's total fees are approximately $2 million less than Plaintiffs' "fair estimate" amount.

[3] *Grantham* was a disability discrimination case brought under Title II of the Americans with Disabilities Act by Nadelle Grantham against several administration officials at Southeastern Louisiana University alleging that the officials dismissed her from the elementary education program at the University because she is deaf.

authority if state law did not provide an answer, has indicated that a defendant's attorneys' fees are irrelevant to a prevailing plaintiff's" (citing *Harkless*)).[4]

The Fifth Circuit is not alone in holding that that the non-prevailing party's fees are not relevant to a prevailing party's request for fees. The Seventh Circuit in *Mirabel*, in rejecting the plaintiff's request to be awarded a fee based on what the opposing side spent in time and money, held that "the amount of fees which one side is paid by its client is a matter involving various motivations in an on-going attorney-client relationship and may, therefore, have little relevance to the value which petitioner has provided to his clients in a given case." *Mirabel*, 576 F.2d at 731. Similarly, the Eleventh Circuit in *Brooks*, in rejecting a district court panel's hourly rate determination, determined that "the hourly rate at which opposing counsel was paid is of little or no relevance." *Brooks*, 997 F.2d 857, 869.

Also, in *Samuel v. University of Pittsburgh*, 80 F.R.D. 293 (W.D. Pa. 1978), in denying the plaintiffs' motion to compel discovery of the billing rates and hours charged by defendants' counsel, the district court held that "the number of hours required by opposing counsel to defend a claim has little relevance to the reasonableness of the number of hours which plaintiffs' counsel devoted to pursuing a cause of action on behalf of a plaintiff," and similarly, "the hourly rate of defense counsel is not relevant to the reasonableness of the hourly rate sought by a plaintiff's counsel." *Id.* at 294-96.

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[4]*MCI* was a sexual harassment and sex discrimination case brought under Texas law by two female employees of MCI against MCI. Interrogatories were served on MCI asking for the names and billing rates of all attorneys (in-house and outside counsel) and paralegals who had represented MCI in the case; the number of hours that those attorneys and paralegals had worked on the case; and the total amount of legal fees and expenses incurred by MCI in the case. *See MCI*, 899 S.W.2d at 401-402.

In contrast, Plaintiffs not only ignore the Fifth Circuit's precedential decision, but cite no other appellate decision. Instead, Plaintiffs rely solely on a few district court decisions from other circuits. (*See* Plaintiffs' Motion at 4).

B. In Addition, a Non-prevailing Party's Attorneys' Fees Is *Not* One of the Factors the Fifth Circuit Considers In Evaluating the Reasonableness of a Proposed Fee Award.

Fee applicants have the burden of demonstrating the reasonableness of the hours expended and the prevailing market nature of the rates requested. *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984).

The Fifth Circuit uses the "lodestar method" to calculate attorneys' fees; and, in assessing the reasonableness of attorneys' fees, it has stated that "a district court must examine the factors set out in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)." *Riley v. City of Jackson,* 99 F.3d 757, 760 (5th Cir. 1996). Those factors are: (1) the time and labor required, (2) the novelty and difficulty of the issues, (3) the skill required to perform the legal services properly, (4) the preclusion of other employment, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the undesirability of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases. *Johnson*, 488 F.2d at 717-19.

It is noteworthy that a non-prevailing party's attorneys' fees is not included as one of the factors in this list. Coupled with the Fifth Circuit's decision in *Harkless*, as well as the decisions from other appellate courts, it is clear that a fee opponents' fee and costs records are irrelevant to the inquiry into whether a fee and cost request is reasonable, and as such, discovery of those records, as governed by FRCP 26(b)(1), should not be permitted.

C. The Purpose for Plaintiffs' Request Was to Coerce a Stipulation that Plaintiffs' Billing Rates and the Time Expended on This Case Have Been Reasonable.

In a letter to Lufkin on January 27, 2005, Plaintiffs warned Lufkin that "if Lufkin intends to challenge the reasonableness of either plaintiffs' counsel's hours or hourly rates, it may be necessary for plaintiffs to conduct discovery on the total hours Lufkin's counsel billed to this matter and your firm's billing rates." (*See* Plaintiffs' Motion, Exhibit 1 at n.1). In their February 2, 2005 letter to Lufkin seeking Lufkin's fee and cost records – after Lufkin expressed its belief that Plaintiffs' counsel's hourly rates and hours billed were unreasonable – Plaintiffs again warned Lufkin that "in the event Lufkin declines to disclose the information voluntarily, plaintiffs will seek production of the information on a expedited basis." (*See* Plaintiffs' Motion, Exhibit 3 at 2).

Lufkin responded to Plaintiffs in a letter on February 7, 2005 informing Plaintiffs that the Fifth Circuit has held that a non-prevailing party's attorneys' fees are not relevant in determining the reasonableness of a fee applicants' request. (*See* Plaintiffs' Motion, Exhibit 4 at 2). Nevertheless, the next day, Plaintiffs both served on Lufkin their request for production seeking Lufkin's fee and cost records and filed a motion to shorten time. The requests are inappropriate and serve no purpose in this litigation. Given that Fifth Circuit law is clear that a non-prevailing party's attorneys' fees are irrelevant to a prevailing party's claim for fees, the request should be denied and the Court should enter an order preventing Plaintiffs from seeking discovery of this information.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I certify that on this 23rd day of February, 2005, a copy of the foregoing Defendant Lufkin Industries, Inc.'s Motion for Protection from Plaintiffs' Fifth Request for Production of Documents was filed electronically through the Court's CM/ECF System and was automatically copied to Plaintiffs through the Court's electronic filing system.

/s/
Attorney for Defendant

CERTIFICATE OF CONFERENCE

Pursuant to FRCP 26(c) and Local Rule CV-7(h), Lufkin's counsel has conferred with Plaintiffs' counsel in a good faith attempt to resolve the matter without court intervention. Plaintiffs' counsel communicated their opposition to this motion.

/s/
Attorney for Defendant

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